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La Ode Ardi Rasila v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–251–08 OF 2014(IDN)
AZIAH ALI, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI JJCA
8 OCTOBER 2015

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Criminal Procedure — Appeal — Conviction and sentence, against — Whether prosecution established prima facie case against appellant — Whether statutory defence of accident available to appellant — Whether trial judge right in finding that shooting was intentional — Whether trial judge adequately considered appellant's defence — Whether trial judge erred in favour of appellant — Whether error had bearing on verdict of guilty arrived at by trial judge

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On 23 October 2013, while the appellant, an Indonesian national, was working as a relief security guard at the USJ Subang Jaya branch of the AmBank ('the bank') he had discharged a pump gun that he was carrying, which had caused the death of Norazita bt Abu Talib ('the deceased'), a cash officer at the bank. The appellant's assignment on that day was to guard the back hall of the bank. At the close of banking hours at 4.30pm, four bank officers, namely the deceased, the person in charge of the branch ('SP23') and two other bank officers continued with their work at the back room. While the deceased and SP23 were in the vault room, situated in the back hall of the bank, putting money into the vault, the appellant had discharged the pump gun at the deceased. The medical cause of the death of the deceased was determined to be 'gunshot wound to the head'. After shooting at the deceased, the appellant had pushed SP23 away from the vault room, rushed into the vault room and emptied it of the money before fleeing the scene. Police investigations later revealed that a total of RM450,000 in cash had been taken out of the vault. The commission of the crime by the appellant was also captured on tape by two static CCTV cameras fixed in the strong room of the bank. While the appellant was waiting to catch a boat to Indonesia, he had been arrested by the police. After his arrest the appellant led the police to recover the pump gun that he used to shoot the deceased, which an expert confirmed to be in good working order. The appellant was charged with the offence of murder under s 302 of the Penal Code ('the Code') and the offence of discharging a firearm with intent to cause death while committing a robbery, an offence under s 3 of the Firearms Act 1971. On the primary facts the trial judge found that a prima facie case had been established against the appellant in respect of both charges and thus called for his defence. The appellant's defence was a defence of accident or misfortune under s 80 of the Code. The appellant gave evidence on oath that he had no intention to shoot the deceased as the gun had discharged accidentally when he

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was about to pump it. The appellant claimed that the purpose of pumping the gun was to attract the attention of SP23 and the deceased, who had their backs to him, and that he had not expected the gun to fire just by pumping it. He thus concluded that it was a mechanical defect that had caused the gun to fire by itself. At the close of the hearing the trial judge found that the appellant had failed to cast any reasonable doubt in the prosecution's case. The appellant was thus found guilty of both charges and sentenced to death for each charge. Hence the present appeal wherein the appellant argued, inter alia, that the trial judge had failed to address his mind properly and adequately to the defence of accident.

Held, dismissing the appeal:

(1) The trial judge was absolutely right in directing the appellant to enter his defence at the close of the prosecution's case as the evidence against the appellant was overwhelming and surpassed the quantum of proof that was required of the prosecution to establish a prima facie case. The CCTV footages provided independent corroborative evidence of the testimonies of SP23 and the other two bank officers, who were present at the scene of the crime, not that their evidence required corroboration in law (see para 21).

(2) In order to avail himself of the benefit of the defence of accident or misfortune under s 80 of the Code, the appellant had to show that he was doing a lawful act in a lawful manner, by lawful means, and with proper care and caution at the time of the accident. In the present case, there was nothing accidental about the shooting in that it was clearly an intentional act as the appellant had set the safety lever of the gun to 'fire' position before he carried out the robbery. Based on the expert's evidence that the gun could only fire by pulling the trigger, mechanical failure could be ruled out. Further, at the time of the purported accidental discharge, the appellant was not doing a lawful act in a lawful manner, by lawful means and with proper care and caution. The appellant could not therefore avail himself of the statutory defence (see paras 42–46).

(3) Even if the appellant had not intended to aim his shot directly at the deceased, he was still guilty of murder by virtue of Illustration (d) to s 300 of the Code. Based on the totality of the evidence, in particular the appellant's conduct after the deceased was shot dead, pointed irresistibly to the fact the shooting was a deliberate act as part of the modus operandi to rob the bank. The trial judge was therefore right in rejecting the appellant's explanation that the gun had exploded accidentally and that he had no intention to kill the deceased. The issue as to whether the shooting was accidental or otherwise was primarily a question of fact for

the trial judge to determine. He had made a clear finding that it was intentional and there was no reason to interfere with that finding of fact (see paras 47–50).

(4) The appellant's argument that the trial judge had failed to address his mind properly and adequately to the defence of accident raised by the appellant had no merit. If at all the trial judge had erred, he had erred in favour of the appellant because in dealing with the appellant's defence he had not directed his mind at all to the provisions of s 80 of the Code and s 105 of the Evidence Act 1950. This was a serious misdirection by way of non-direction because by not directing his mind to these two provisions, the trial judge had failed to appreciate that the law imposed on the appellant the legal burden of proving his defence on a balance pf probabilities and not merely to raise a reasonable doubt in the prosecution case. However, as the error was favourable to the appellant, the error had no bearing on the verdict of guilty arrived at by the trial judge. It stands to reason that if the appellant could not succeed on the lower evidential burden of proof that he could not have succeeded on the heavier legal burden of proving his defence on the balance of probabilities (see paras 53–58).

[Bahasa Malaysia summary

Pada 23 Oktober 2013, sementara perayu, seorang warganegara Indonesia, bekerja sebagai pengawal keselamatan bantuan di cawangan AmBank USJ Subang Jaya ('bank') dia telah melepaskan satu tembakan senapang pam yang dibawanya, yang telah menyebabkan kematian Norazita bt Abu Talib ('si mati'), seorang pegawai tunai di bank. Tugasan perayu pada hari itu adalah untuk mengawal dewan belakang bank. Pada akhir waktu perbankan pada pukul 4.30 petang, empat pegawai bank, iaitu si mati, orang yang bertanggungjawab cawangan (SP23) dan dua pegawai bank lain meneruskan dengan kerja-kerja mereka di bilik belakang. Sewaktu si mati dan SP23 berada di dalam bilik kebal, yang terletak di dalam dewan belakang bank, memasukkan wang ke dalam peti besi, perayu telah melepaskan senapang pam pada si mati. Punca perubatan kematian si mati telah ditentukan sebagai 'gunshot wound to the head'. Selepas menembak si mati, perayu telah menolak SP23 jauh dari bilik kebal, bergegas ke dalam bilik kebal dan dikosongkan ia daripada wang sebelum melarikan diri daripada tempat kejadian. Siasatan polis kemudiannya mendedahkan bahawa sejumlah RM450,000 tunai telah dikeluarkan dari bilik kebal. Perbuatan jenayah oleh perayu juga telah dirakamkan di pita rakaman melalui dua kamera CCTV statik yang dipasang di bilik kebal bank. Sewaktu perayu menunggu untuk menaiki bot ke Indonesia, dia telah ditangkap oleh polis. Selepas penangkapannya perayu membawa polis kepada penemuan senapang pam yang digunakannya untuk menembak si mati, yang mana disahkan oleh pakar boleh berfungsi dengan baik. Perayu dituduh dengan kesalahan membunuh di bawah s 302 Kanun

Keseksaan ('Kanun') dan kesalahan melepaskan senjata api dengan niat untuk menyebabkan kematian semasa melakukan rompakan, satu kesalahan di bawah s 3 Akta Senjata Api 1971. Pada fakta utama hakim perbicaraan mendapati bahawa satu kes prima facie telah dibuktikan terhadap perayu berhubungan kedua-dua pertuduhan dan oleh itu memanggil untuk pembelaannya. Pembelaan perayu adalah pembelaan kemalangan atau nasib malang di bawah s 80 Kanun. Perayu memberikan keterangan bersumpah bahawa dia tidak mempunyai niat untuk menembak si mati dan senapang itu telah melepaskan tembakan secara tidak sengaja apabila dia hendak mengepam senapang itu. Perayu mendakwa bahawa tujuan mengepam senapang adalah untuk menarik perhatian SP23 dan si mati, yang membelakangkan si mati, dan bahawa dia tidak menyangka senapang itu akan melepaskan tembakan dengan hanya mengepam senapang itu. Dia oleh itu menyimpulkan bahawa ia adalah kecacatan mekanikal yang telah menyebabkan senapang itu melepaskan tembakan dengan sendirinya. Pada akhir perbicaraan hakim perbicaraan mendapati bahawa perayu gagal untuk menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan. Perayu itu didapati bersalah atas kedua-dua pertuduhan dan dijatuhi hukuman mati bagi setiap pertuduhan. Oleh itu rayuan ini dimana perayu berhujah, antara lain, bahawa hakim perbicaraan telah gagal membawa fikirannya dengan betul dan secukupnya untuk pembelaan kemalangan.

Diputuskan, membatalkan rayuan:

(1) Hakim perbicaraan adalah sememangnya betul dalam mengarahkan perayu untuk memasukkan pembelaannya pada akhir kes pendakwaan kerana keterangan terhadap perayu adalah amat menggalakkan dan melepasi kuantum bukti yang diperlukan pihak pendakwaan membuktikan kes prima facie. Bahagian rakaman CCTV menyediakan keterangan sokongan tersendiri daripada keterangan SP23 dan dua pegawai bank, yang berada di tempat kejadian jenayah, bukan keterangan mereka memerlukan pembuktian dalam undang-undang (lihat perenggan 21).

(2) Untuk membela dirinya dengan manfaat pembelaan kemalangan atau musibah di bawah s 80 Kanun, perayu perlu menunjukkan bahawa dia telah melakukan satu tindakan yang sah dengan cara yang sah, dengan tujuan yang sah, dan dengan penjagaan yang betul dan berhati-hati di masa kemalangan. Dalam kes ini, tiada kemalangan tentang tembakan kerana ia jelas satu tindakan yang disengajakan kerana perayu telah menetapkan tuil keselamatan senapang ke kedudukan 'fire' sebelum dia melakukan rompakan itu. Berdasarkan keterangan pakar bahawa senapang itu hanya boleh ditembak dengan menarik picu, kegagalan mekanikal boleh ditolak. Selanjutnya, pada masa pelepasan tidak sengaja yang dikatakan, perayu tidak melakukan sesuatu perbuatan yang sah dengan cara yang sah, dengan tujuan yang sah dan dengan penjagaan

yang betul dan berhati-hati. Perayu tidak boleh dengan itu membela dirinya dengan pembelaan berkanun (lihat perenggan 42–46).

(3) Jika pun perayu tidak berniat untuk membidik tembakannya terus kepada si mati, dia masih bersalah atas pembunuhan menurut kuasa Illustrasi (d) s 300 Kanun. Berdasarkan kepada keseluruhan keterangan, terutama tindakan perayu selepas si mati ditembak mati, menunjukkan cadangan kepada fakta kejadian itu adalah satu perbuatan yang disengajakan sebagai sebahagian daripada modus operandi untuk merompak bank. Hakim perbicaraan oleh itu adalah betul dalam menolak penjelasan perayu bahawa senapang telah meletup secara tidak sengaja dan bahawa dia tidak mempunyai niat untuk membunuh si mati. Isu sama ada tembakan adalah tidak sengaja atau pun sebaliknya adalah pada awalnya satu soalan fakta untuk ditentukan hakim perbicaraan. Dia telah membuat dapatan nyata bahawa ia adalah sengaja dan tiada sebab untuk campur tangan terhadap dapatan fakta itu (lihat perenggan 47–50).

(4) Hujahan perayu bahawa hakim perbicaraan gagal untuk membawa fikirannya dengan betul dan secukupnya kepada pembelaan kemalangan yang dibangkitkan oleh perayu tidak mempunyai merit. Jika sekali pun hakim perbicaraan terkhilaf, dia telah terkhilaf memihak kepada perayu kerana dalam berurusan dengan pembelaan perayu dia telah tidak mengarahkan fikirannya langsung kepada proviso s 80 Kanun dan s 105 Akta Keterangan 1950. Ini adalah salah arah yang serius melalui tiada arahan kerana dengan tidak mengarahkan fikirannya kepada dua proviso ini, hakim perbicaraan gagal untuk menilai bahawa undang-undang mengenakan ke atas perayu beban undang-undang untuk membuktikan pembelaannya atas imbangan kebarangkalian dan bukan hanya membangkitkan keraguan munasabah dalam kes pendakwaan. Walau bagaimanapun, kekhilafan adalah memihak kepada perayu, kekhilafan itu tidak mempunyai kaitan dengan keputusan bersalah dicapai oleh hakim perbicaraan. Dengan alasan bahawa jika perayu tidak boleh berjaya atas beban pembuktian keterangan yang lebih rendah bahawa dia tidak mungkin berjaya atas beban undang-undang yang lebih berat untuk membuktikan pembelaannya atas imbangan kebarangkalian (lihat perenggan 53–58).]

Notes

For cases on conviction and sentence, against, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 580–585.

Cases referred to

Mat v PP [1963] 1 MLJ 263; [1963] 1 LNS 82 (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, FC (refd)

A *PP v Yuvaraj* [1962] 2 MLJ 189; [1968] 1 LNS 116, PC (refd)
Thomas v Thomas [1947] AC 484, HL (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (refd)

Legislation referred to

B Evidence Act 1950 ss 2, 105
Firearms (Increased Penalties) Act 1971 s 3
Penal Code ss 80, 300, 302

C **Appeal from:** Criminal Trial Nos 45B-199–11 of 2013 and 45D-200–11 of 2013 (High Court, Shah Alam)

Selvi Sandrasegaram (Azura Alias with her) (Gooi & Azura) for the appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Abdul Rahman Sebli JCA:

THE CHARGES

E **[1]** The appellant, an Indonesian national was charged with two offences, one for murder under s 302 of the Penal Code and the other for discharging a firearm with intent to cause death while committing robbery, an offence under s 3 of the Firearms (Increased Penalties) Act 1971 ('the Firearms Act'). The
F offences were committed in the same transaction and both carry the death penalty. The charges were as follows:

> First Charge
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> Bahawa kamu pada 23 Oktober 2013 di antara jam lebih kurang 6.00 petang hingga 6.30 petang, di dalam Bangunan Ambank No. 5 & 7, Jalan USJ Sentral 2,
G USJ Sentral, Subang Jaya, dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan bunuh ke atas seorang perempuan Melayu bernama Norazita binti Abu Talib [No. K/P: 760712-08-5172] dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.
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H Second Charge
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> Bahawa kamu pada 23 Oktober 2013 di antara jam lebih kurang 6.00 petang hingga 6.30 petang, di dalam bangunan Ambank No. 5 & 7, Jalan USJ Sentral 2, USJ Sentral, Subang Jaya, dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah melakukan suatu kesalahan berjadual iaitu rompakan dan pada masa
I melakukan rompakan telah melepaskan tembakan dari senjata api jenis Pump Gun No. siri A 1287832 dengan niat menyebabkan kematian kepada Norazita binti Abu Talib [No. K/P: 760712-08-5172]. Oleh yang demikian kamu telah melakukan satu kesalahan di bawahseksyen 3 Akta Senjata Api (Penalti lebih berat) 1971 dan boleh dihukum di bawah seksyen yang sama.

[2] After a full hearing the appellant was found guilty on both counts and sentenced to death for each charge. This is his appeal against conviction. Having heard arguments from both sides we dismissed his appeal by a unanimous decision and these are our grounds.

THE PRIMARY FACTS

[3] The crime was committed in the presence of three bank officers and captured on tape by two static CCTV cameras fixed in the strong room of the bank, showing at one stage the appellant's full face as he was making his getaway after committing this horrendous crime.

[4] The facts are quite straightforward. On the date of the incident, the appellant was on duty at the USJ Subang Jaya branch of the AmBank as relief security guard to replace a colleague who was on leave. He was armed with a pump gun. This was not the first time that he was on relief duty at the branch. He had been on relief duty at this branch several times before and was familiar with the premises and the officers and staff of the bank, and so were they with him.

[5] The appellant's assignment on that day was to guard the back hall of the bank and he was on duty for the whole duration of the working day. At the close of banking hours at 4.30pm and after the shutters were closed, four bank officers, all females continued with their work at the back room. They were Ifasri Wahyuni bt Mansur ('SP9'), Laila Azwa bt Samingan ('SP10'), Arzana bt Abdullah ('SP23') and the deceased Norazita bt Abu Talib, who was a cash officer.

[6] The deceased's final act before her life was snuffed out by the appellant was to put the money into the vault. She was accompanied by SP23, the head of service and overall in charge of the USJ Subang Jaya Am Bank branch. SP23's recollection of the events was that at about 6.15pm she and the deceased were in the vault room to put the money into the vault. Her duty was to make sure that all the money was put in. The deceased was standing right in front of the vault door. As for the appellant, he was standing nearby, apparently waiting for the right moment to strike.

[7] While the deceased was arranging the money in the vault, suddenly SP23 heard a deafening noise in the vault. At the same time she saw sparks of fire, followed by the appellant rushing towards her and pulling her out of the vault room and pushing her aside, causing her to fall onto the floor. She thought she had been shot and was going to die. It was all in her mind though as she found herself being pulled into the operation room by SP9. She then heard the appellant ordering everyone to keep quiet in a loud voice.

[8] CCTV footages showed that after SP23 had been pulled away from the vault room, the appellant rushed towards the vault and began emptying it of the money. Police investigation later revealed that he took out a total of RM450,000 in cash. As he fled the bank, the appellant gestured to the horrified bank officers to keep quiet by placing his finger on his lips.

[9] It was SP23's testimony that before the robbery and while she was counting the money at the operation counter, the appellant had asked her 'what time will the money be put in?' SP23 told the appellant it would be done in a moment. She said she was a bit surprised by the question as the appellant never asked that question before.

[10] The testimonies of SP9 and SP10 confirmed SP23's testimony in material respects. SP9's account was that while she and SP10 were sorting out the files at the operation counter, she heard a loud explosion and as she turned around, she saw very thick smoke in the strong room. The deceased had by then collapsed onto the floor. Then she heard SP23 frantically asking her to check on the deceased. She moved forward intending to help but was held back by the appellant who pointed the gun at her and ordering her to get back to the operation counter.

[11] SP9 also recalled that before the shooting, the appellant kept asking her what time they were going to finish their work as he said he had some matter to attend to. Like SP23, she found the appellant's question to be strange as it was not normal for the security guards to ask such question and in fact the appellant never asked that question before.

[12] SP9 further testified that security guards were not allowed to be in the vault area when the vault was opened. They were supposed to guard the front door. This prompted the learned trial judge to ask why then did she not ask the appellant to leave if that was the procedure. SP9 said she had no explanation.

[13] The medical cause of the deceased's death was determined by the forensic pathologist Dr Mohamad Azaini bin Ibrahim ('SP5') to be 'Gunshot wound to the head'. She had been hit directly in the face just above the nose and the impact almost blew off the upper part of her face and exposing her brain as shown in photos 28 and 29 of exh P13.

[14] Her face was totally disfigured, with her right eyeball protruding awkwardly out of place. Her left eyeball was gone. Exhibit P13(15), which is a close up photo of her body lying on the floor in a pool of blood shows some brain matter beside her head. In the same photo, blood can be seen splattered on the wall. Such was the extent of the violence inflicted on this innocent lady.

[15] Having accomplished his mission, the appellant went into hiding for 18 days until his capture on 10 November 2013 by ASP Ahmad Fauzi bin Mohamed Zin ('SP15'). SP15's evidence was that while he was at the Kota Tinggi District Police Headquarters, Johor he received information that a suspect wanted for the murder and robbery at AmBank Subang Jaya was in the vicinity of the Tanjung Belungkor jetty, Kota Tinggi.

[16] SP15 and his men immediately proceeded to Tanjung Belungkor to set up an ambush in the jetty area. While making his observation at around 7.00am SP15 noticed that the appellant appeared to be waiting for something at the jetty. SP15 confronted the appellant and arrested him after ascertaining his identity. As will be seen from his own evidence which we shall discuss later in this judgment, the appellant was about to catch a boat to Indonesia. The police had captured him in the nick of time.

[17] Earlier the police had on the date of the murder itself arrested another Indonesian security guard by the name of Lapolo, who was the appellant's colleague and friend. He hails from the same village in Indonesia as the appellant. At the time of his arrest, the police seized RM21,800 in RM100 notes from him which he had hidden in a black stocking. It was part of the money that the appellant robbed from the bank.

[18] Lapolo was called as a witness by the prosecution ('SP11'). In his testimony he admitted seeing the appellant at around 6.30pm on the day of the murder. It was his evidence that at that meeting the appellant passed to him a bundle of money to be handed over to his (appellant) wife. The appellant also passed to him his uniform and motorcycle to be rid off. However he claimed that he knew nothing about the robbery, a claim which the learned judge was very skeptical of, and for good reasons. For an offence related to his possession of the proceeds of the robbery, SP11 was charged and sentenced to four years imprisonment.

[19] After his arrest the appellant led the police to recover the pump gun that he used to shoot the victim. He had thrown it in a drain at USJ Subang Jaya while escaping after the murder and robbery. Expert examination of the gun by Armament Officer Insp Mohd Faizi bin Jabri ('SP22') confirmed that it was in good working order and serviceable with no defect detected.

[20] As part of the procedure to test if the gun could fire accidentally, SP22 dropped the gun from a height of 5 feet while the safety lever was in 'fire' position. It did not discharge any shot on impact, which means an accidental discharge was not possible. According to SP22 the mechanics of the gun was such that a shot could only be fired by pulling the trigger. The only conclusion

that can be drawn from the test result is that the appellant had deliberately pulled the trigger in order to fire the shot that hit and killed the deceased.

PRIMA FACIE CASE

[21] On these primary facts, the learned trial judge found that a prima facie case had been established against the appellant in respect of both charges and accordingly called for his defence. In our view the learned judge was absolutely right in calling for the defence as the evidence against the appellant was overwhelming and surpassed we would say the quantum of proof that is required of the prosecution to establish a prima facie case. The CCTV footages provide independent corroborative evidence of the testimonies of SP9, SP10 and SP23, not that their evidence requires corroboration in law.

THE DEFENCE CASE

[22] When called upon to state his defence, the appellant chose to give evidence on oath. He was the sole witness for the defence. He did not dispute the sequence of events as narrated by the prosecution. Nor did he deny that it was the shot fired from his pump gun that killed the deceased. His defence was that he had no intention to shoot the deceased as the gun had discharged accidentally when he was about to pump it. He said his intention was only to rob, not to kill anyone.

[23] The appellant's story was that the idea of robbing the bank was hatched by a friend, also an Indonesian by the name of Ja Omar. According to him, Ja Omar told him it was better to rob the bank than to work there for a long time. When the appellant asked him how was he to escape after the robbery, Ja Omar assured him that escaping would not be a problem as they could call Umi, a 'tekong' from Johor to drive them to Johor after the robbery and then from Johor they would cross over to Indonesia by boat.

[24] The appellant said he was familiar with Umi as he had used his services before whenever he went back to his village in Indonesia. According to the appellant, his immediate response to Ja Omar's idea was 'kamu gila kah?' That was one week before the incident.

[25] The night before the robbery, the appellant put up at Ja Omar's house. While he was there he received a telephone call from his employer asking him to replace a regular guard at USJ Subang Jaya branch who was on leave. He said it was just after he finished his maghrib prayers that he received the call. Ja Omar reminded him of their plan the week before and asked him again if he could do it.

[26] At the same time Ja Omar gave him encouragement by saying that it was not difficult to rob the bank. Ja Omar then made a phone call to Umi who was in Johor at that time. After making the phone call, he informed the appellant that Umi had agreed to fetch them at Subang Jaya at 5.00pm. The agreed transportation charge was RM800.

[27] That night he and Ja Omar continued to discuss the plan to rob the bank. In cross-examination the appellant said Ja Omar even taught him how to carry out the robbery, which was by threatening the bank officers with the gun first, round them up, take away their mobile phones and then confine them in a room.

THE MURDER AND ROBBERY

[28] The following morning Ja Omar sent the appellant to his work place using his (appellant) motorcycle and they reached the bank at 7.40am. The appellant started his work by switching on the lights and the air conditioners in the bank. After that he took his service gun from the store, loaded it and went about his guard duties as usual.

[29] At about 1pm Ja Omar called to inform him that Umi had arrived by car from Johor. Ja Omar told him to hurry up as Umi was very angry at having to wait for them. Umi insisted on returning to Johor immediately as he wanted to avoid the traffic jam at Subang Jaya. According to the appellant this was against Umi's earlier agreement to fetch them at 5pm and not 1pm. However, after some negotiation Umi agreed to wait until 6pm.

[30] What happened next according to the appellant was that Ja Omar called him seven to eight times, asking him when was he going to rob the bank. This constant pestering by Ja Omar made him nervous and he had to go to the toilet several times, trying to figure out how to carry out the robbery while at the same time thinking of Umi who had been waiting for them since 1pm. In that state of mind, he decided it was time to strike but as he was about to pump the gun, it exploded. This is what he said verbatim: 'Jadi masa itu saya cakap, saya baru nak pump macam ni (saksi menggayakan) terus meletup'.

[31] After the deceased had been shot and after he had taken out the money from the vault, the appellant went out through the front door of the bank and made his escape together with Ja Omar who was waiting outside on his motorcycle. They drove through the back lane and as they were passing a drain to the left, the appellant threw the gun into the drain. They then proceeded to Lapolo's place of work at Cosway Jalan Subang 4. Umi was already on standby to drive them to Johor. They reached Johor at 11pm and proceeded straight to Tasik Pulai.

[32] According to the appellant, the purpose of pumping the gun was to attract the attention of SP23 and the deceased who were having their backs facing him. He said the idea was, with the clacking sound of the gun being pumped, SP23 and the deceased would turn towards him and he would then warn them that it was a robbery. He did not expect the gun to fire just by pumping it. In other words it was a mechanical defect that caused the gun to fire by itself.

[33] The appellant explained that although he was assigned as an armed guard, he had no practical experience in firing the gun. He admitted having attended the training on the use of the pump gun but denied taking part in the actual shooting. He said this was because the back kick of the gun when fired terrified him.

DEFENCE OF ACCIDENT AND BURDEN OF PROOF

[34] It is obvious that the appellant's defence was a defence of accident or misfortune under s 80 of the Penal Code, which provides as follows:

> 80 Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

[35] It is a complete defence in the sense that if established would entitle the appellant to an outright acquittal, unlike for instance a defence of grave and sudden provocation to a murder charge which if established would only reduce the offence to culpable homicide not amounting of murder, but not entitling the accused to a total acquittal.

[36] The defence of accident or misfortune falls under the general exceptions in the Penal Code and as such must be read together with s 105 of the Evidence Act 1950 ('the Evidence Act') which reads:

> 105 When a person is accused of any offence, the burden of proving the existence of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

[37] If not for this provision, the appellant would have no duty to prove or to disprove that the shooting was accidental. In fact he would have no duty to prove or to disprove anything. He would be entitled to an acquittal if he succeeded in merely raising a reasonable doubt in the court's mind as to his guilt: *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82. But because of this provision, that would not be sufficient to earn him an acquittal. In order to succeed, he must prove by admissible evidence that the shooting was in fact an accident. In the words of s 105 of the Evidence Act 'the court shall

presume the absence of those circumstances'.

[38] It is in this limited sense that step (e) of the guideline laid down by Suffian J (as he then was) in *Mat v Public Prosecutor* has no application. Step (e) is as follows: 'If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt ... Acquit'.

[39] The first thing to note with regard to that case is that the appellant (Mat) had no legal burden of proof to discharge. He had been charged with stealing two chickens and in the alternative of retaining a stolen chicken ands 105 of the Evidence Act did not come in to play. His burden was merely evidential, merely to cast a reasonable doubt as to his guilt and not the legal burden of proving or disproving anything, let alone to prove that he did not steal the two chickens or to retain a stolen one. The legal burden to prove the charges remained with the prosecution throughout and never shifted.

[40] That is not the legal position in the case before us. The legal burden of proof had shifted to the appellant by operation of s 105 of the Evidence Act 1950. As for the quantum of proof required to discharge that burden, it is the civil burden of proof, which is lighter than proof beyond reasonable doubt but heavier than to merely cast a reasonable doubt in the prosecution case: *Public Prosecutor v Yuvaraj* [1962] 2 MLJ 189; [1968] 1 LNS 116 (PC); *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 (FC).

[41] The word 'proved' is defined by s 2 of the Evidence Act 1950 as follows:

> proved' A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

WHETHER DEFENCE OF ACCIDENT AVAILABLE TO THE APPELLANT

[42] It is important to bear in mind that it is not just any accident or misfortune that entitles an accused person to the benefit of the defence under s 80 of the Penal Code. It is only available where the accused was doing a lawful act in a lawful manner, by lawful means, and with proper care and caution at the time of the accident or misfortune. The illustration to the section gives some idea as to the kind of accident or misfortune that the law excuses. The illustration is as follows:

> A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

[43] Now, the first question to ask in relation to the appellant's claim of accidental shooting is whether the statutory defence was available to him at all. On the facts we can say once that it was not. In the first place there was absolutely nothing accidental about the shooting. It was clearly an intentional act as the appellant had set the safety lever of the gun to 'fire' position before he carried out the robbery. Mechanical failure can be ruled out as SP22's testimony was that the gun could only fire by pulling the trigger. There is no expert evidence to the contrary.

[44] Further, it was the appellant's own admission in cross-examination that the safety lever was in 'lock' position when he started his duty that morning, meaning to say it was not set in a position ready to fire. When confronted with this fact, the appellant came up with the story that the safety lever was defective. However he admitted that he did not inform his employer of this alleged defect.

[45] Secondly, at the time of the purported accidental discharge, the appellant was not doing any lawful act in a lawful manner, by lawful means and with proper care and caution. It was daylight robbery pure and simple and the appellant's intention all along was to use the gun in committing the robbery. Committing armed robbery cannot by any stretch of the imagination be described as doing a lawful act, unlike what the hatchet man was doing in the illustration to s 80 of the Penal Code.

[46] The fact that the gun was loaded, with the safety lever set at 'fire' position and aimed at the deceased as determined by the learned judge after watching the CCTV footages removes all traces of doubt that the shooting was anything but intentional. The appellant could not therefore avail himself of the defence under s 80 of the Penal Code. His claim that SP23 and the deceased were having their backs facing him when the gun accidentally exploded was certainly a lie as the deceased was hit directly in the face. It was an attempt to mislead the court.

[47] Even if the appellant had not intended to aim his shot directly at the deceased, he was still guilty of murder by virtue of Illustration (d) to s 300 of the Penal Code which provides:

> (d) A, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

[48] The totality of the evidence, in particular the appellant's conduct after the deceased was shot dead points irresistibly and unerringly to the fact that the shooting was a deliberate act as part of the modus operandi to rob the bank. There was total disregard for the safety of the deceased. We have no doubt that

the murder was intended by the appellant to be a warning to the other bank officers not to stand in his way. The learned trial judge was therefore right in rejecting the appellant's explanation that the gun had exploded accidentally and that he had no intention to kill the deceased.

[49] Whether or not the shooting was accidental or otherwise is primarily a question of fact for the trial judge to determine. He had made a clear finding that it was intentional. We found no reason to interfere with this finding of fact. On the evidence before the court, that was the only reasonable inference that will account for all the known facts.

[50] We have reminded ourselves of the principle that a court of appeal should 'attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence' and consequently should not disturb a judgment of fact unless we were satisfied that it is unsound: Watt or *Thomas v Thomas* [1947] AC 484 (HL).

FAILURE TO CROSS-EXAMINE BY THE PROSECUTION

[51] It was submitted by learned counsel for the appellant that there was failure by the learned judge to appreciate the lack of cross-examination by the prosecution on the appellant's evidence that he was in a nervous state of mind when he pumped the gun. Nor was any challenged made in cross-examination to the appellant's evidence that he did not take part in any shooting exercise. This failure to cross-examine according counsel amounts to an admission by the prosecution of the unchallenged facts, citing *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138.

[52] With due respect to counsel, the fact that the appellant was nervous and an inexperienced shooter, even if true, is not evidence that he was incapable of firing the shot intentionally. This is to underestimate the appellant's capability, who had planned the robbery well in advance. In any case the evidence does not at all show that the shooting was an act of a nervous robber. But more importantly, the learned judge had made a firm finding of fact that the shooting was intentional. In the circumstances the failure by the prosecution to challenge the appellant's evidence on the points mentioned by counsel was a failure of no consequence.

TRIAL JUDGE ERRED IN FAVOUR OF THE APPELLANT

[53] We therefore rejected counsel's argument that the learned trial judge failed to address his mind properly and adequately to the defence of accident raised by the appellant. If at all the learned judge had erred, he had erred in favour of the appellant. We say this because in dealing with the appellant's

defence the learned judge did not direct his mind at all to the provisions of s 80 of the Penal Code and s 105 of the Evidence Act 1950.

[54] This is a serious misdirection by way of non-direction because by not directing his mind to these two provisions, the learned judge failed to appreciate that the law imposed on the appellant the legal burden of proving his defence on the balance of probabilities and not merely to raise a reasonable doubt in the prosecution case.

[55] Of course the appellant was still entitled to an acquittal based on the 'reasonable doubt' test but only with regard to any other element of the charges in respect of which he had no legal burden to discharge, such as whether he had been properly identified as the perpetrator of the crime, or whether the gun was serviceable (in respect of the second charge) or even whether the deceased's death was due to gunshot wound fired from his gun.

[56] It needs no emphasis however, and there is more than sufficient authority on this point, that the doubt that the court entertains must be a real and reasonable doubt arising from the evidence or for want of evidence and not just any doubt plucked from nowhere. It is wrong to acquit at the slightest hint of doubt. A real doubt is a doubt that stands up to reason. If the doubt dissipates the moment the fa?e is unveiled by reason, we can safely say that it is an imaginary doubt conjured up to justify the unjustifiable.

[57] Thus, since the error by the learned judge was an error that was favourable to the appellant, the point raised by learned counsel has no bearing on the verdict of guilty arrived at by the learned judge. In this regard the learned judge's finding was that the appellant failed to cast any reasonable doubt in the prosecution case, which means every essential ingredient of the offences had been proved beyond reasonable doubt by the prosecution.

[58] By simple logic, if the appellant could not succeed on the lower evidential burden of proof, there is no question that he could have succeeded on the heavier legal burden of proving his defence on the balance of probabilities.

THE FIREARMS CHARGE

[59] With regard specifically to the second charge, it appeared that the appellant was not seriously contesting his conviction for the offence. No submission was made with respect to the second charge and it is clear that counsel's focus was on the question of whether or not the appellant had fired the shot accidentally.

[60] The argument seems to be that since the discharge was accidental, the appellant could not be guilty of discharging a firearm with intent to cause death or hurt in the course of committing a robbery. We have gone through the entire evidence carefully and we were firmly of the view that the trial court's decision to convict the appellant of the second charge is unassailable.

[61] There was discharge of a serviceable firearm during the course of a robbery and the discharge was with intent to cause death or hurt to a person and death in fact ensued. A man who intentionally shoots another at a vital part of his body must be presumed to intend his death, unless he can prove that his act falls under any of the general exceptions in the Penal Code, which the appellant failed to do.

[62] It was for all the reasons aforesaid that we unanimously dismissed the appellant's appeal and affirmed his conviction and sentence in respect of both charges.

Appeal dismissed.

Reported by Kohila Nesan